BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by	)	SPB Case No. 38131
	)	
ETHEL D. HUNTER	)	**BOARD DECISION**
	)	(Precedential)
	)	
From dismissal from the position of Account Clerk II with the Department of Social Services at Sacramento	)	**NO. 96-11**
	)	
	)	August 7-8, 1996

Appearances: Isaac Gonzalez, Labor Relations Representative, California State Employees Association, on behalf of appellant, Ethel D. Hunter; Charlene Lopez, Staff Counsel, California Department of Social Services, on behalf of respondent, California Department of Social Services.

Before: Lorrie Ward, President; Floss Bos, Vice President; Ron Alvarado, Richard Carpenter and Alice Stoner, Members.

DECISION

This case is before the State Personnel Board (Board) for determination after the Board rejected the attached proposed decision of the Administrative Law Judge (ALJ) in the matter of the appeal by Ethel D. Hunter (appellant), from dismissal from the position of Account Clerk II with the Department of Social Services at Sacramento (Department).

Appellant was dismissed for excessive absenteeism arising out of a substance abuse problem. The ALJ found that appellant's misconduct constituted cause for discipline under Government Code section 19572, subdivision (c) inefficiency, (j) inexcusable absence without leave, and (d) inexcusable neglect of duty.[1]

[1]The ALJ dismissed the charge of insubordination [Government Code § 19572, subdivision (e)], finding no evidence in the record indicating that appellant's failure to comply with her attendance restrictions was intentional or that appellant demonstrated an attitude of defiance.

However, under the authority of Department of Parks and Recreation v. State Personnel Board (Duarte) (1991) 233 Cal.App.3d 813 and our Precedential Decision Karen Nadine Sauls (1992) SPB Dec. No. 92-13, the ALJ modified the penalty to a six months' suspension without pay and reinstated appellant conditioned upon her agreement to submit to periodic and random substance abuse testing on a voluntary basis, and to submit certification from a health care professional that she has completed a chemical dependency recovery program and is drug-free.

After a review of the entire record, including the transcript, exhibits, and the written arguments of the parties[2], the Board agrees with the findings of fact in the attached Proposed Decision and adopts these findings as its own. The Board also concurs with the conclusions of law set forth in the attached Proposed Decision, with the exception of the discussion of penalty at pages 16-19. Accordingly, the Board adopts the attached ALJ's Proposed Decision to the extent it is consistent with the discussion below.

ISSUE

The Board has been presented with the following issue for its determination:

> Whether evidence of post-dismissal rehabilitation is sufficient to warrant modification of appellant's

[2]No oral argument was requested by either party.

dismissal for excessive absenteeism caused by substance abuse.

DISCUSSION

When performing its constitutional responsibility to review disciplinary actions [Cal. Const. Art. VII, section 3(a)], the Board is charged with rendering a decision which is "just and proper". (Government Code section 19582.) The Board has broad discretion to determine a "just and proper" penalty for a particular offense, under a given set of circumstances. (See Wylie v. State Personnel Board (1949) 93 Cal.App.2d 838.) The Board's discretion, however, is not unlimited. In the seminal case of Skelly v. State Personnel Board (Skelly) (1975) 15 Cal.3d 194, the California Supreme Court noted:

> While the administrative body has a broad discretion in respect to the imposition of a penalty or discipline, it does not have absolute and unlimited power. It is bound to exercise legal discretion which is, in the circumstances, judicial discretion. (Citations) 15 Cal.3d at 217-218.

In exercising its judicial discretion in such a way as to render a decision that is "just and proper," the Board considers a number of relevant factors to assess the propriety of the discipline imposed by the appointing power. Among the factors the Board considers are those specifically identified by the Court in Skelly as follows:

> ...[W]e note that the overriding consideration in these cases is the extent to which the employee's conduct resulted in, or if repeated is likely to result in [h]arm to the public service. (Citations.) Other relevant

> factors include the circumstances surrounding the misconduct and the likelihood of its recurrence. (Id.)

The Board's statutory authority to modify or revoke an adverse action is specified in Government Code section 19583, which provides, in relevant part:

> The adverse action taken by the appointing power shall stand unless modified or revoked by the board. If the board finds that the cause or causes for which the adverse action was imposed were insufficient or not sustained, or that the employee was justified in the course of conduct upon which the causes were based, it may modify or revoke the adverse action....

The Board's authority to modify a penalty imposed by an appointing power was discussed by the court in Department of Parks and Recreation, supra, in which the court noted:

> Under this statutory scheme, the Board may find that the cause for discipline was "sustained" but was "insufficient" to justify the penalty imposed. There are thus three bases for modification or revocation of the appointing power's imposition of discipline: (1) the evidence does not establish the fact of the alleged cause for discipline; (2) the employee was justified; or (3) the cause for discipline is proven but is insufficient to support the level of punitive action taken. Unless one of these factors is present the appointing power's action must stand. 233 Cal.App.3d at 847 (emphasis added).

In Department of Parks and Recreation, the court held that the Board may consider evidence of post-dismissal rehabilitation for purposes of determining the appropriate penalty. In that case, a state park equipment operator was dismissed following his conviction for sexually molesting his stepdaughter. On appeal, the Board modified the dismissal to a lengthy suspension based largely upon post-dismissal evidence of the employee's rehabilitation. The

Board based its decision on evidence that, for more than two years since his dismissal, the employee had been undergoing intensive psychological therapy; his treating psychologists considered his rehabilitation efforts to be successful and felt that he was extremely unlikely to engage in the same type of conduct in the future. Based upon this evidence, the court concluded that the Board did not abuse its discretion in modifying the dismissal.

Following Department of Parks and Recreation, we issued our Precedential Decision in Karen Nadine Sauls, supra, in which we modified the discipline of an Office Assistant for absenteeism related to drug abuse from dismissal to a fourteen-month suspension conditioned upon the employee providing documentation of her participation in a rehabilitation program, certification from a licensed physician that appellant was recently examined and found to be drug-free, and documentation of her agreement to submit to random drug testing for one year following her reinstatement. Like appellant in this case, Sauls had previously been disciplined for inexcusable absence without leave, and was dismissed for recurring excessive absenteeism attributable to her dependence on drugs.[3] Also like appellant, Sauls ceased using drugs shortly after she was dismissed from state service, and began attending a rehabilitation

[3]As a basis for her current adverse action, Sauls was absent on 70 days over a nine-month period, and had her pay docked for 450 hours, or approximately 33 percent of a full-time schedule of hours over that period. She attributed her absenteeism to her dependence on methamphetamines.

program shortly before her hearing before the Board.

In Sauls, a majority of the Board members[4] concluded that, under the authority of Department of Parks and Recreation, the evidence of ongoing rehabilitative efforts presented by Sauls was sufficient to warrant giving her another chance at state employment, based on "the fairly minimal risk of harm to the public service, her satisfactory work record, the nature of her position, her sincerity, and her willingness to undergo voluntary random drug testing as a means of assuring the Department of the unlikelihood of recurrence." Sauls, at page 10.

In her dissent, Member Ward expressed her views that, although under the rationale in Department of Parks and Recreation the Board has discretion to consider post-dismissal evidence of rehabilitation, neither the facts nor the evidence in that case warranted the use of that discretion to conditionally reinstate the appellant and to modify the dismissal to a suspension. Because Sauls was employed for less than two years when she received her first adverse action, was involved in illegal drug use which impacted her attendance, and failed to clean up her act even after receiving the first adverse action, Member Ward concluded that special consideration by the Board was unwarranted. Moreover,

[4]Three Board members (President Richard Carpenter, Vice President Alice Stoner and Member Clair Burgener) joined in the majority opinion. Member Richard Chavez did not participate in the decision. Member Lorrie Ward filed a dissenting opinion.

Member Ward concluded that the evidence that Sauls had stopped using drugs approximately one month after her dismissal, began participating in Alcoholic's Anonymous only two weeks prior to the hearing before the ALJ, and intended to continue in her rehabilitation, did not establish an unlikelihood of recurrence, particularly in light of a prior failed attempt at rehabilitation.

As the facts of this case are similar to those in Sauls, the Board finds itself in a position to revisit the issue of whether evidence of post-dismissal rehabilitation should always militate against dismissal of an employee whose substance abuse problem has manifested itself in misconduct. Here, appellant was absent without leave for 69 percent of her scheduled hours over a five-month period. As a result of her absences, other staff worked 501.5 hours to cover her position during that period.

After consideration of the entire record in this case, the Board concludes that the penalty of dismissal imposed by the Department should be sustained. In reaching this conclusion, we note that, notwithstanding appellant's 17 years of service for the Department, her absences created a substantial harm to the public service by requiring her colleagues to spend large amounts of time covering for her. Thus, the primary Skelly factor, harm to the public service, militates in favor of a strong penalty.

We decline to find sufficient mitigating factors in this case to warrant modification of the penalty imposed by the Department.

One of the important Skelly factors is the likelihood of recurrence of the misconduct upon which the adverse action was based. While we recognize our authority to consider post-dismissal evidence of rehabilitation in determining the appropriate penalty, we conclude that the evidence of appellant's rehabilitative efforts is insufficient to warrant modification of the penalty of dismissal. While the post-dismissal evidence introduced at the hearing indicated that appellant may well have been sincere in her desire to "turn over a new leaf," we cannot conclude that this evidence establishes a low likelihood of recurrence. Appellant received numerous warnings about her attendance problems and a prior, uncontested adverse action over the same misconduct. The sole evidence of rehabilitation consists of appellant's testimony that she attended approximately 15 Alcoholics Anonymous meetings during the two-month period between her dismissal and the hearing before the ALJ, received spiritual counseling from a clergyman following her dismissal, and was admitted into a medically-supervised treatment program the day before the commencement of the hearing. While appellant and her witnesses expressed hope that her rehabilitation would be successful, there is simply insufficient evidence for the Board to conclude that appellant's extremely egregious attendance problems are not likely to persist. Accordingly, we conclude on the record before us that the causes

for discipline proven are sufficient to justify the penalty imposed.

We note, further, that our decision in this case is consistent with the requirements of the federal Americans with Disabilities Act, 42 U.S.C. section 12101, et seq. (ADA), which went into effect for public employers on January 26, 1992. Current illegal drug use, including the unlawful use of prescription drugs, is not a protected disability under the ADA. 42 U.S.C. section 12114(a). In addition, even if appellant's drug use were to be considered a disability, a state agency may lawfully discipline an employee for misconduct, even if that misconduct is attributable to substance abuse. Gonzalez v. California State Personnel Board (California Department of Education) (1995) 33 Cal.App.4th 422; see also Collings v. Longview Fibre Co. (9th Cir. 1995) 63 F.3d 828, cert. denied (1996) 116 S.Ct. 711.[5]

CONCLUSION

We acknowledge the factual conflict between our decision in this case and our prior ruling in Sauls, in which we afforded an employee with only two years of state service and one month of post-dismissal rehabilitative efforts a second chance at state employment. Under Department of Parks and Recreation, we may, but

[5]Moreover, because appellant did not disclose her drug use to the Department until after she was terminated, there would be no basis for finding that appellant was disciplined because of absenteeism arising out of any disability. Miller v. National Casualty Co. (8th Cir. 1995) 61 F.3d 627.

need not, consider evidence of post-dismissal rehabilitation in determining penalty. If we were to decide Sauls today, we would likely find the evidence in that case was also insufficient to justify modification of the penalty, as our reasoning in that case would reflect the more fully developed state of the law regarding discipline for misconduct attributable to substance abuse.

We do not intend to suggest that post-dismissal evidence of rehabilitation can never be relevant in determining the appropriate penalty: it may be relevant to the extent it demonstrates the likelihood of recurrence of the misconduct for which an employee is disciplined. We hold simply that the evidence in this case does not warrant the conclusion that the causes for discipline proven were insufficient to justify the penalty imposed.

ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in this case, and pursuant to Government Code section 19582, it is hereby ORDERED that:

1. The attached ALJ's Proposed Decision is adopted to the extent it is consistent with this Decision;

2. The dismissal of Ethel D. Hunter from the position of Account Clerk II with the Department of Social Services at Sacramento is sustained.

3. This decision is certified for publication as a Precedential Decision pursuant to Government Code section 19582.5.

THE STATE PERSONNEL BOARD

Lorrie Ward, President

Floss Bos, Vice President
Ron Alvarado, Member
Richard Carpenter, Member
Alice Stoner, Member

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on August 7-8, 1996.

_____
C. Lance Barnett, Ph.D.
Executive Officer
State Personnel Board

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by	)	
	)	
ETHEL D. HUNTER	)	Case No. 38131
	)	
From dismissal from the position	)	
of Account Clerk II with the	)	
Department of Social Services	)	
at Sacramento	)	

PROPOSED DECISION

This matter came on regularly for hearing before Shawn P. Cloughesy, Administrative Law Judge (ALJ), State Personnel Board (SPB or Board), on November 1, 1995 in Sacramento, California. The matter was submitted for decision after oral closing argument.

The appellant, Ethel D. Hunter, was present and was represented by Isaac Gonzalez, Attorney, California State Employees Association (CSEA).

The respondent, Department of Social Services (DSS), was represented by Charlene Lopez, Staff Counsel.

Evidence having been received and duly considered, the ALJ makes the following findings of fact and Proposed Decision:

I

The above dismissal effective September 1, 1995, and appellant's appeal from it, comply with the procedural requirements of the State Civil Service Act.

II

EMPLOYMENT HISTORY

Appellant began working for the State of California as a seasonal clerk with the Franchise Tax Board on April 14, 1971. She was appointed to numerous seasonal positions with various departments until she was appointed as an Assistant Clerk with Department of Benefit Payments (DBP), now DSS, on October 3, 1977. Appellant was appointed to other clerical positions with DSS until she was appointed as an Account Clerk II with DSS on October 13, 1981.

Appellant received a one-step reduction in salary for six months, effective February 15, 1995, for absence without leave (AWOL) from work for 107.5 hours from November 3, 1994 through January 19, 1995. Appellant did not appeal the action.

III

ALLEGATIONS

The charged acts occurred from March through August 1995. It is alleged that appellant was absent from work 69 percent (%) of her work hours from March 1 to August 13, 1995; was AWOL on 15 occasions for a total of 88.6 hours, and failed to follow procedures required by her attendance restriction on seven occasions. This conduct was alleged to violate Government Code sections 19572 (c) inefficiency, (d) inexcusable neglect of duty,

(e) insubordination, and (j) inexcusable absence without leave.[6]

IV

FINDINGS OF FACT

Appellant is an Account Clerk II in the DSS Travel Claims Unit. She is supervised by Accounting Office Supervisor Karen Freemyers (Freemyers). Appellant and respondent stipulated to the truth of the following facts:

1. On January 31, 1995, appellant was served with an adverse action, effective February 15, 1995, in which her salary was reduced one (1) step for six months for inefficiency; inexcusable neglect of duty, and inexcusable absence without leave. She did not appeal this adverse action.

2. Throughout the time period covered in this adverse action, appellant was employed as an Account Clerk II with the Department. In this position, her duties included stamping in and sorting all incoming mail each day (travel expense claims, invoices, etc.) for the Travel Unit and distributing to the appropriate desk; comparing each travel claim to ensure that an account has been accurately set up for claimants; and inputting travel claims and entering payment data into the Office Automation tracking system. When these functions are not performed, it adversely affects the Travel Unit's ability to maintain their 15-work day turnaround time for reimbursement to departmental employees.

3. Because of the problems related to the types of deficiencies noted in this Notice of Adverse Action, appellant was referred to the Employee Assistance Program on March 29, 1995 and April 18, 1995.

4. Appellant has been on attendance restrictions since prior to 1990. Subsequent to her salary reduction effective February 15, 1995, she had been advised about the requirements for obtaining approval for absences as set forth below:

[6] At the hearing, respondent withdrew the charged violation of Government Code section 19572 (m), discourteous treatment of the public or other employees.

a. On or about April 18, 1995, appellant was instructed by her supervisor, Freemyers, to follow established policies for obtaining approval for sick or vacation leave.[7] Specifically, she was instructed that:

(1) If for any reason appellant could not come to work, she must call in by 7:30 a.m. that morning. She must speak to her supervisor, Freemyers, or Freemyers' supervisor, Didi Okamoto, or Cynthia Louie, if appellant's supervisor is not available. Appellant must not leave a voice mail message. She must leave the following information with the person she speaks to: (1) why appellant is not coming in; (2) how long appellant will be off from work; and (3) a phone number or location where appellant can be contacted.

(2) If appellant is out due to illness, she must be personally seen by a physician within 24 hours of the beginning of the absence period. She is to provide written substantiation from the physician. In the event she cannot be seen within the first 24 hours, she is required to provide written justification from her doctor that there was no appointment available during that time period. If appellant cannot provide this justification for any doctor's appointment that does not fall within the required 24 hours, she will be AWOL for all hours prior to the actual doctor's appointment.

(3) If appellant is out longer than two days, she is required to mail her doctor's notes. The postmark for the doctor's note must be the same as the date she was seen by the doctor. It is appellant's responsibility to ensure that the doctor's note is received within the specified time frame. Appellant is to send her doctor's notes to the attention of her supervisor, Freemyers.

(4) This documentation must be an original on the physician's letterhead and must include the dates of illness, a general description of the nature of

[7] On November 18, 1994, Freemyers wrote appellant a memorandum (memo) which placed her on attendance restriction from November 18, 1994 to March 31, 1995. These restrictions were continued in the April 18, 1995 attendance restriction memo.

the illness, when appellant will return to work, and list any limitations that would keep her from performing her regular job duties. It must be signed and dated by the physician.

(5) Any family sick leave must be substantiated with medical documentation from a physician. This documentation must be on the physician's letterhead and must include the dates of illness and general description of the nature of the illness. The physician must state that appellant's presence was required and identify the family member the sick leave was for. The physician must also sign and date the documentation.

(6) Any vacation must be approved by appellant's supervisor, Freemyers, or Freemyers' supervisor(s) in her absence, at least 24 hours prior to the requested time off. No vacation will be authorized in lieu of sick leave.

(7) Any tardiness either in the morning or from lunch or break will result in AWOL.

(8) Any emergency arising during the day requiring appellant to leave work due to personal or family illness must be discussed with her supervisor, Freemyers, or Freemyers' supervisor(s) in her absence.

(9) Any time off from work which did not have the required approvals or medical documentation as stated above would be charged as AWOL.

b. The above instructions were reiterated in a memorandum from appellant's supervisor, Freemyers, dated April 18, 1995. Attached to that memo was a memo dated November 18, 1994, with similar instructions. The attendance restrictions as outlined in the memorandum dated April 18, 1995 were extended 60 days, beginning April 18, 1995.

c. In a memorandum dated July 11, 1995, appellant was notified that as a result of her absences in May and July 1995, the above attendance restrictions would be extended 60 days from June 18, 1995.

5. Appellant has been inexcusably absent without leave on the following dates and for the following increments:

   a. On March 2, 1995, appellant was 15 minutes late, and was therefore, reported AWOL for .3 hours.

   b. On March 3, 1995, appellant was 20 minutes late, and was therefore, reported AWOL for .4 hours.

   c. On April 7, 1995, appellant arrived 10 minutes late to work at 7:10 a.m., and therefore was reported AWOL for .2 hours.

   d. On May 3, 1995, appellant called in at 7:25 a.m. and stated that her stomach was aching. Because appellant failed to provide a doctor's verification for this absence, she was reported AWOL for 8.0 hours for May 3, 1995.

   e. On May 5, 1995, appellant left work at 7:48 a.m. She failed to provide a doctor's verification for this absence, and was therefore, reported AWOL for 7.2 hours on May 5, 1995.

   f. On May 10, 1995, appellant arrived 30 minutes late to work at 7:30 a.m., and was therefore, reported AWOL for .5 hours on May 10, 1995.

   g. On May 25, 1995, appellant called in at 7:22 a.m. and stated that her grandchild was running a high fever. On May 26, 1995, appellant called in at 7:24 a.m. and stated she would not be in due to a family crisis. She later spoke with Cynthia Louie at 8:13 a.m. and told her appellant had family problems and would not talk about it until Tuesday. Appellant failed to provide a doctor's verification for the care of her grandchild and was, therefore, reported AWOL 8.0 hours on May 25, 1995. Appellant failed to request time of 24 hours in advance for May 26, 1995, and was therefore, reported AWOL for 8.0 hours on May 26, 1995.

   h. On July 10, 1995, appellant called in at 7:40 a.m. and stated she had some personal business to take care of. Appellant failed to request time off 24 hours in advance as instructed, and was therefore, reported AWOL 8.0 hours on July 10, 1995.

i. On July 11, 1995, appellant called in at 7:35 a.m. and stated that she had a family member who was ill. Because appellant failed to provide a doctor's verification and a statement that her presence was required as instructed, appellant was therefore, reported AWOL 8.0 hours on July 11, 1995.

j. On July 14, 1995, appellant called in at 8:15 a.m. stating she did not feel well and would not be in. Because no medical substantiation has been received, appellant was reported AWOL for 8.0 hours on July 14, 1995.

k. On July 20, 1995, appellant called in at 7:40 a.m. and stated she had stomach cramps and would be going to the doctor. On July 21, 1995, appellant called in at 7:50 a.m. and stated she would not be in. When appellant's supervisor asked appellant if she went to the doctor, appellant responded that she "just couldn't fit it in." Because no medical substantiation has been received, appellant was reported AWOL for 8.0 hours on July 20, 1995 and 8.0 hours for July 21, 1995.

l. On July 31, 1995, appellant called in at 7:35 a.m. and stated that she had car problems and would not be in. Appellant arranged to call her supervisor back at noon that day, but she did not call. Because appellant failed to request time off 24 hours in advance, she was reported AWOL for 8.0 hours on July 31, 1995.

m. On August 3, 1995, appellant called at 7:45 a.m. and stated she would not be in on August 4, 1995, because she had to go to court. On August 7, 1995, appellant called in at 8:05 a.m. and stated her court date had been postponed until today and she would not be in. Because appellant failed to request this time off 24 hours in advance, she was reported AWOL for 8.0 hours on August 7, 1995.

6. Appellant failed to follow established procedures, as outlined in paragraph 4 above, and was therefore insubordinate, and/or failed to provide the required substantiation as instructed for her absences as follows:

a. On March 13, 1995, appellant called in and stated she was going to the doctor to set up some physical therapy as a result of an automobile accident which she stated she was involved in on March 8, 1995. A doctor's verification

for March 13 through 15, 1995 was hand delivered on March 15, 1995. Appellant failed, as instructed, to mail the note on the day she was seen by a doctor when out longer than two days.

b. On March 16, 1995 appellant called in at 8:40 a.m. and stated she was worse and wouldn't be in. She indicated she would call the doctor for an appointment. On March 17, 1995, appellant called in at 7:50 a.m. She stated she saw her doctor on March 16, 1995 and the doctor instructed her to stay home until March 18, 1995. The doctor's verification for March 16 and 17, 1995 was hand delivered after business hours on March 17, 1995 and not mailed, as instructed, on the day appellant was seen by a doctor when out longer than two days.

c. On March 20, 1995, at 6:55 a.m., appellant called in and stated she had stomach cramps. On March 21, 1995, at 7:35 a.m., appellant called in and stated she brought a note in that morning. This note indicated appellant could return to work on March 22, 1995. However, on March 22, 1995, at 7:50 a.m., appellant called in and stated her stomach was still cramping. On March 23, 1995, appellant called in at 7:25 a.m. and stated she had talked to the doctor by phone on March 22, 1995 and he would extend her absence through March 23, 1995.

Appellant brought in a note from her doctor's office on March 23, 1995 indicating she was seen on March 20, 1995, given telephone advice by an advice nurse on March 22, 1995, and would be unable to return to work through March 23, 1995. Appellant was not personally seen by her physician on March 22, 1995, as required, nor did she provide substantiation that an appointment was not available. In addition, the note appellant provided on March 23, 1995 was signed by an advice nurse and appellant failed to mail the note as instructed when out longer than two days.

d. On June 2, 1995, appellant's supervisor received a doctor's verification in the mail stating that appellant had been ill since May 30, 1995 and would be unable to return to work until June 19, 1995 pending reevaluation. On June 26, 1995, appellant's supervisor received a doctor's verification in the mail stating that appellant was ill and unable to return to work until July 3, 1995 pending reevaluation. On July 7, 1995, appellant's supervisor received a doctor's verification in the mail

stating that appellant had been ill since May 30, 1995 and could resume full duties with no restrictions on July 10, 1995. This note was not postmarked the same day as the doctor prepared it, as instructed, nor was appellant seen by a doctor on July 3, 1995, as required.

e. On July 22, 1995, appellant called in at 7:20 a.m. and stated her neck and back were causing her pain and she would go to the doctor. A doctor's verification for her absence was received on July 14, 1995 stating she was ill and could return to work on July 14, 1995. The note was not mailed, as instructed, on the day appellant was seen by a doctor when out longer than two days.

f. On August 1, 1995, appellant called in at 8:45 a.m. and stated she was not feeling well and would not be in. While appellant provided a note for this date, she failed to mail in on the day she was seen by the doctor, as instructed when out longer than two days.

g. On August 8, 1995 appellant called in at 7:35 a.m. and stated she had been in an accident on the way home from her court date. On August 9, 1995, appellant called in at 8:20 a.m. and stated her side was stiff. While appellant provided a doctor's verification for August 7 through 9, 1995, she failed to mail her doctor's note on the day she was seen by the doctor, as instructed, when out longer than two days.

7. Appellant has been absent from her position 69 percent of the hours she was scheduled to work as follows:

Month	Hours Absent	Percentage
March 1995	112.7 hours of 176	64%
April 1995	40.2 hours of 168	24%
May 1995	79.7 hours of 176	45%
June 1995	176.0 hours of 176	100%
July 1995	176.0 hours of 176	100%
August 1-13, 1995	64.0 hours of 64	100%
Total	648.6 hours of 936	Absent 69%

V

Freemyers testified that appellant's absences directly affected her scheduling of the work in the Travel Claims Unit and imposed a hardship on appellant's coworkers. Appellant's processing of the mail for the unit was crucial to the unit's efficiency, and her absences diminished the level of service the unit provided to the department. As a result, the unit staff worked the following hours to cover appellant's position when she was absent.

Month	Hours Worked by Other Staff
March 1995	79 hours
April 1995	33.6 hours
May 1995	57 hours
June 1995	158.85 hours
July 1995	128.6 hours
August 1-13, 1995	44.4 hours

Freemyers has supervised appellant since October 1994. Freemyers testified that appellant performed her job when she was closely supervised and her time was structured. Freemyers had not increased appellant's job duties.

VI

Post-Dismissal Rehabilitation

On February 14, 1986, appellant had her last drink. Prior to that, she had abused alcohol for nine years.

In 1990, appellant was prescribed Vicodin, to relieve her pain after her hysterectomy. Appellant took more than the prescribed amount to obtain a "high." After her prescription expired, she bought Vicodin illegally, "off the streets." Appellant claimed that she last used Vicodin on September 12, 1995. Prior to this, appellant was taking 40 tablets or capsules of Vicodin a day for three years.

Appellant "denied" that she had a substance abuse problem until she was terminated. She was referred by CSEA to the Kaiser Permanente (Kaiser) Chemical Dependency Recovery Program (program) on September 12, 1995. She was examined by the Kaiser medical staff that day, and was prescribed medication for the withdrawal affects of Vicodin detoxification.

Appellant applied for enrollment in the program on September 12, 1995. She was informed that she could not be enrolled until she completed a seven day detoxification.

On September 22, 1995, appellant was examined by Kaiser Licensed Vocational Nurse (L.V.N.) Howell to determine her condition. On September 24, appellant was examined by Dr. C.S. Waters at Kaiser. On September 25, appellant attended a 90 minute Kaiser group session entitled "Prescription Drug Group."

On October 24, 1995, appellant attended a Narcotics Anonymous meeting at Oak Park Fellowship. On October 25, appellant attended two 90 minute group sessions at Kaiser entitled "Prescription Drug

Group," and an Alcoholics Anonymous meeting. On October 27, appellant attended a Kaiser group session entitled "Patient Orientation Intake Group." On October 30, appellant attended a 90 minute group meeting related to the program, entitled "Openminded." On October 31, appellant attended a 90 minute group session at Kaiser entitled "Beginning Sobriety Group."

Appellant estimated that she attended 15 self-help group meetings between September 12, 1995 and the date of hearing. She paid $134.00 each month to remain in the program.

On October 31, appellant was accepted into the program. She signed a Treatment Contract which indicated that 1) the program lasted 12 months; 2) appellant would be subject to random urine drug screening; 3) she was required to attend three to four self-help meetings a month; and 4) she agreed to remain drug-free. If appellant violates this contract, she can be removed from the program.

VII

Reverend Vernon Kincey (Rev. Kincey) is a pastor at Fountain of Life Church of God in Christ in Sacramento. He has ministered to at least 100 individuals with substance abuse problems. Rev. Kincey has casually known appellant for two years. Within the last two months, appellant has been under his "watchcare."[8]

[8] "Watchcare" is a program at the church, where a church leader specifically ministers to the needs of the individual while he/she is considered for membership in the church.

Appellant did not discuss her specific drug problem with Rev. Kincey, but he spiritually ministered to her in approximately four to five telephone calls, lasting one-half hour each, and other counselling sessions at the church and her house.

Rev. Kincey does not consider himself a professional substance abuse counselor. He testified, however, that appellant was highly motivated to overcome her substance abuse problem. He could not guarantee that appellant would be able to successfully leave her prior lifestyle of substance abuse.

VIII

The notice of adverse action, effective February 15, 1995 stated:

> "Because of the problems related to the types of deficiencies noted in this notice of adverse action, you were referred to the Employee Assistance Program on June 4, 1993, July 21, 1994, and November 18, 1994."

On November 18, 1994, and March 27, and April 18, 1995, Freemyers wrote memos to appellant regarding her absenteeism. In each memo, Freemyers referred appellant to Employee Assistance Program Coordinator David Fontes (Fontes), and listed a phone number where he could be contacted. Appellant received these memos on November 21, 1994, and March 29, and April 18, 1995, respectively.

Freemyers was not informed by appellant, or anyone else, that she had a substance abuse problem. Once, Freemyers indirectly asked appellant if she could help her, but appellant declined.

Appellant did, however, mention that she was going to contact the Employee Assistance Program.

* * * * *

PURSUANT TO THE FOREGOING FINDINGS OF FACT, THE ADMINISTRATIVE LAW JUDGE MAKES THE FOLLOWING DETERMINATION OF ISSUES:

Inefficiency

In Richard Vasquez Ramirez (1994) SPB Dec. No. 94-05, p. 15, the Board stated:

> Unlike most of the other causes for discipline that appear in section 19572, inefficiency does not always require a demonstration of intentional wrong doing. Bearing in mind the principles of progressive discipline, the department may discipline an employee on grounds of inefficiency when the employees' absence significantly reduces the employee's effectiveness and creates hardship for his or her supervisors or coworkers.

In Letitia Renee Allen (1995) SPB Dec. No. 95-06, the Board further explained:

> In each case, the ALJ must consider all the circumstances in determining whether the employee's absenteeism is so excessive that it compromises the employer's legitimate interest in workplace efficiency and justifies disciplining the employee for conduct that may well be non-volitional. ... We agree that discipline is not appropriate in cases where the absenteeism is not truly excessive or has little impact on the workplace.

Appellant was absent for 648.6 hours over a five and one-half month period, 69% of her work hours. Other staff in the unit worked 501.45 hours to cover appellant's work in processing the mail to reimburse the travel expense claims for DSS employees. Appellant

was excessively absent from the workplace. Her absences created a hardship for her other coworkers who had to perform their jobs and hers. Appellant's absences compromised the work unit's "interest in workplace efficiency," and violated Government Code section 19572 (c).

Inexcusable Absence Without Leave

On March 2, and 3, and April 7, 1995, appellant admitted that she reported to work late by 15, 20, and 10 minutes, respectively. Appellant offered no excuse for her tardiness on these days, which violated Government Code section 19572 (j). Lesbhia F. Morones (1994) SPB Dec. No. 94-23.

On April 18, 1995, appellant was placed on attendance restriction. On July 13, the attendance restriction was extended another 60 days retroactively from June 18. Appellant was not on notice that she was under attendance restriction between June 19 and July 13. Appellant therefore did not violate Government Code section 19572 for absences covered by the July 6 doctor's verification, and the July 10 and 11 absences.

Appellant admitted that she did not follow the requirements set forth in the April 18, 1995 attendance restriction memo for her absences on May 3, 5, 10, 25, and 26, and July 14, 20, 21, and 31, and August 7. Her failure to follow these requirements violated Government Code 19572 (j).

Inexcusable Neglect of Duty and Insubordination.

The Board has previously defined inexcusable neglect of duty to include "an intentional or grossly negligent failure to exercise due diligence in the performance of a known official duty." [Walter H. Morton, Jr., (1994) SPB Dec. No. 94-26, p. 8, citing Gubser v. Dept. of Employment (1969) 271 Cal.App.2d 240, 242]. Appellant had a duty to follow the attendance restrictions imposed due to her past poor attendance record.

Appellant admitted that she did not follow the requirements set forth in the April 18, 1995 attendance restriction memo for her absences on May 3, 5, 10, 25, and 26, and July 14, 20, 21, and 31, and August 7. She also admitted that she did not comply with the attendance restrictions on March 15, 17, 22, and 23, July 14, and August 1 and 9, 1995. Appellant's failure to follow these requirements violated Government Code section 19572 (d).

In Richard Stanton (1995) SPB Dec. No. 95-02, p. 10, the Board held regarding charges of insubordination:

> "In summary, to support a charge of insubord-ination, an employer must show mutinous, disrespectful or contumacious conduct by an employee, under circumstances where the employee has intentionally and willfully refused to obey an order a supervisor is entitled to give and entitled to have obeyed. (citations omitted). A single act may be sufficient to constitute insubordination if it meets the above test.
>
> . . . Appellant has no right to put conditions on his obedience. Appellant's initial refusal to obey his supervisor's order constitutes insubordination."

While appellant failed to comply with the attendance restriction

memos, no evidence indicated that her failure was intentional. The record does not reflect an attitude of defiance by appellant. The charge of Government Code section 19572 (e) is dismissed accordingly.

Penalty

The factors which the Board considers in determining whether a "just and proper" penalty was imposed are:

> ...[W]e note that the overriding consideration in these cases is the extent to which the employee's conduct resulted in, or if repeated is likely to result in [h]arm to the public service. (Citations.) Other relevant factors include the circumstances surrounding the misconduct and the likelihood of its recurrence. [Skelly v. State Personnel Board (1975) 15 Cal.3d 194, 218].

Appellant was repeatedly counselled and warned about her absenteeism. These warnings were set forth in several absence restriction memos, and a disciplinary one-step reduction in salary for six months for excessive absences and non-compliance with a attendance restriction memo from November 1994 to January 1995.

The harm to the public service in this case is great. Appellant was absent 69% of her work hours over a period of five and one-half months. Other employees had to work 501.45 hours to cover appellant's workload due to her absences.

Post-dismissal rehabilitation evidence can be considered to decide whether the misconduct is likely to recur. Department of Parks and Recreation v. State Personnel Board (Duarte) (1991) 233 Cal.App.3d 813. Appellant requests that her 17-plus years of

service afford her another chance because of her post-dismissal rehabilitation efforts and her willingness to submit to random substance abuse testing.

In Karen Nadine Sauls (1992) SPB Dec. No. 92-13, an Office Assistant with three years of state civil service with the Department of Transportation was terminated because of absenteeism. Her work responsibilities required payment of the department's bills. She received two adverse actions for excessive absences, and the second was a dismissal. The absenteeism was attributed to her substance abuse of methamphetamine. The Board modified the dismissal to a 14 months suspension based upon the findings that the employee's rehabilitative efforts were sincere and credible, and she was willing to submit to voluntary drug-testing for a year.

Appellant has been a state employee for over 17 years. Like Sauls, appellant is a clerical employee, has one prior action for absenteeism, but none regarding her job performance; and she is willing to submit to random drug testing. Appellant has attended 15 drug counselling sessions since her dismissal, and has provided documentation for seven of those meetings. She has also sought spiritual help to get her "entire life together." Appellant is paying for her treatment personally.

Respondent argued that it is too soon to determine whether appellant will recover from her past addiction. As in Sauls, the appropriate remedy is to suspend appellant for a lengthy period

conditioned upon her agreement to submit to periodic and random substance abuse testing on a voluntary basis, and to require certification from a health care professional that she has completed a chemical dependency recovery program and is drug-free. A six months suspension "should serve as a punishment for past misconduct and a strong message that future misconduct will not be tolerated." Sauls, *supra*, p. 11.

As in Sauls, conditional reinstatement is ordered for appellant after the suspension is served. She must provide to DSS by March 1, 1996:

1) Documentation of her ongoing participation or completion in a chemical dependency recovery program from the date of her November 1995 hearing through the date of reinstatement;

2) Current certification from a health care professional in the chemical dependency recovery field that appellant has been recently examined, and substance abuse tested and been determined to be drug-free;

3) Documentation of appellant's commitment to undergo voluntarily random substance abuse testing for a period of one year from the date of her reinstatement;

Any expenses incurred in substance abuse testing will be borne by DSS. Any substance abuse testing of appellant will occur at

reasonable intervals to be determined by respondent, in accordance with the procedures set forth in the DPA substance abuse testing rules, except that DSS need not establish reasonable suspicion to test.

* * * * *

WHEREFORE IT IS DETERMINED that the adverse action of dismissal of appellant Ethel D. Hunter, effective September 1, 1995, is hereby modified to a suspension for six months and conditional reinstatement on March 1, 1996.

The matter is hereby referred to the Chief Administrative Law Judge, and shall be set for hearing upon the written request of either party in the event the parties are unable to agree whether appellant has satisfied the conditions for reinstatement.

* * * * *

I hereby certify that the foregoing constitutes my Proposed Decision in the above-entitled matter and I recommend its adoption by the State Personnel Board as its decision in the case.

DATED: December 1, 1995.

SHAWN P. CLOUGHESY

Shawn P. Cloughesy,
Administrative Law Judge,
State Personnel Board.